

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-17V

September 21, 2012

Not for Publication

ROBERT PERRETTA,

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Petitioner,

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v.

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Motion to dismiss based on
preference to sue civilly for
malpractice in state court

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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Eric P. Czelusta, Wilfred H. Florin, Pearl Harbor, FL, for petitioner.

Julia W. McNerny, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On January 19, 2012, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10-34, alleging that influenza vaccine significantly aggravated his Guillain-Barré syndrome (GBS).

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

During a telephonic status conference held on August 28, 2012, petitioner's counsel mentioned that petitioner was considering filing a state court malpractice suit.

On September 5, 2012, the undersigned issued an Order stating that the statutory 240 days for the issuance of a decision had expired and petitioner could withdraw his petition within 30 days of the Order. 42 U.S.C. § 300aa-12(g).

On September 19, 2012, the undersigned held another telephonic status conference during which petitioner's counsel stated that his client wanted to sue civilly for the hospital administrator's medical malpractice in vaccinating him when he had GBS. Petitioner wants the opportunity to have his wife sue for loss of consortium (an option unavailable under the Vaccine Act) and seeks to benefit from the higher cap for pain and suffering in Florida (\$500,000.00 to \$1.5 million) than the Vaccine Act's cap for pain and suffering (\$250,000.00).

Respondent requested the opportunity to file a Rule 4(c) Report which the undersigned denied because this is not a decision on the merits but on a logistical approach to seeking damages in another forum. Petitioner certainly has the statutory right to proceed outside this forum since 240 days have elapsed since he filed his petition.

The undersigned grants petitioner's motion for a decision dismissing the petition.

FACTS

Petitioner was born on June 23, 1946.

On January 13, 2007, petitioner went to Mease Countryside Hospital Emergency Room, complaining of blurry vision, weakness, chest pain in his upper chest, and shortness of breath. Med. recs. Ex. 3, at 5.2. While there, on that same date, he received influenza vaccine and Pneumovax (adult pneumococcal vaccine). Med. recs. Ex. 3, at 5.14 and 5.15. On January 14, 2007, Dr. William W. Huntley noted that petitioner could not stand unaided. Med. recs. Ex. 4, at 5.20. He was diagnosed with GBS.

DISCUSSION

Under the provisions of 42 U.S.C. § 300aa-21(b), a petitioner may choose to withdraw his petition. Congress wanted to give petitioners the option to remain in the Vaccine Program or to pursue their legal remedy elsewhere. Petitioner herein has decided to sue in state court. Petitioner's motion to dismiss is **GRANTED**.

CONCLUSION

This petition is **DISMISSED**. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

September 21, 2012
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.